IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 821 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS
and
Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

MOHMED YUNUS @ MUNIM OF FAZLEAJIJ PATHAN

Appearance:

MR BY MANKAD, APP for appellant

MR MJ BUDDHABATTI for Respondent No. 1

CORAM : MR.JUSTICE K.R.VYAS
and
MR.JUSTICE R.P.DHOLAKIA

Date of decision: 19/04/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE R.P.DHOLAKIA)

State has preferred the present appeal against the judgment and order dated 30-6-1998 passed by the learned Additional City Sessions Judge, Ahmedabad in Sessions Case No.124 of 1997 whereby the present respondent-accused No.1 was acquitted for the offences punishable under Secs.8 and 29 of the N.D.P.S. Act.

2. The facts in short are that on 1-5-1997 while P.I., Narcotic Cell, Gujarat State, Ahmedabad was in his office, he received information through his secret informant that two persons were selling the narcotic substance very near to Topi Mill, Gomptipur Garden, Footpath, Ahmedabad along with their description. He reduced the same in writing. Thereafter, he called the panchas through Head Constable, Vittaldas. When panchas arrived at the office, he informed them regarding the secret information and primary panchnama was prepared in the office. Thereafter, he along with other Police Officer and panchas went to the place in question for raiding purpose in Government vehicle. When they reached very near to the place in question, at about 16.35 hours, they saw two persons, whose descriptions have been given by the secret informant standing very near the footpath and he immediately called P.I., Shri Chauhan. Head Constable, Shri Kataria caught hold of them. Thereafter, P.I., Shri Tehelramani asked their name, address, etc. by introducing himself as P.I. and stated that he got information that they were keeping narcotic substance in their possession and selling the same to the public. He asked them whether they wanted to carry out the search in presence of an Executive Magistrate or a Gazetted Officer and same was given in writing also, but they have not opted for the same. Hence, they were searched in presence of panchas and other police officers and 18 packets weighing 1 gram and 190 milligram and 8 packets weighing 1 gram and 180 milligram of narcotic substance were found from Mohamedyusuf @ Munim and another person Mohamadyasin Mahmadnazir Anzari respectively and same was kept in a separate empty tobacco tin packets after affixing seal in presence of panchas. Necessary panchnama was also completed there and they all went to the house of accused No.2. They carried out search in that house, but nothing was found from there and nil panchnama was prepared and on reaching the scene of offence, P.I., Shri Tehelramani filed complaint before Gomptipur Police Station which was registered as Prohi. C.R. No.III-5178 of 1997 at Gomptipur Police Station. Investigation of the same was handed over to PSI, Shri Parasiya, who started the investigation by recording the statement of various witnesses and muddamal in question

was sent to FSL through Head Constable Shri Ranjitsinh. Report received from the FSL was kept in the file. At the end of investigation, he filed the charge-sheet in the City and Sessions Court at Ahmedabad.

3. During the course of investigation, as the accused No.2-Mahamadyasin Mahamadnazir Ansari died on 26-8-1997, charge was framed only against accused No.1-Mahamadyusuf @ Munim. He pleaded not guilty to the charge and claimed to be tried. Therefore, case was sent to the Court of learned Additional City Sessions Court No.3, Ahmedabad.

4. To prove the guilt against the accused, prosecution produced documentary evidence and also examined oral witnesses. At the end of trial, after recording the further statement of accused No.1 and after hearing the learned advocates appearing for the respective parties, learned Additional Sessions Judge acquitted the accused No.1 in the offence in question against which, present appeal is preferred by the State.

5. At the time of admission, non-bailable warrant was issued against the accused and he was sent to judicial custody. On receiving the paper book, matter was placed before this Court for final hearing. Since this is an appeal where the present respondent-accused, who was acquitted in the year 1998, is in jail, priority was given.

6. We have heard Mr.B.Y.Mankad, learned APP for the State and Mr.M.J.Buddhapatti, learned counsel, who has rendered his services as requested by this Court on behalf of the respondent-accused.

7. We have gone through the record and proceedings which have been shown to us by the learned counsel appearing for the respective parties more particularly oral as well as documentary evidence. Mr.Mankad read the evidence of panchas namely, P.W.1-Manubha Bhagvansinh Jadeja and P.W.3-Arvindbhai Chhanabhai Raval, but they have not supported the case of the prosecution and have been declared hostile. Nothing came out when they were cross-examined by the learned APP. Relying upon the evidence of P.I., Shri Tehelramani-P.W.8, complaint and panchnama, Mr.Mankad has argued that in absence of evidence of panch witnesses, Court can certainly rely upon the evidence of Police Officer and convict the accused in the crime in question. He has also taken us through the oral evidence of P.W.2-Vittaldas Prajaji, Head Constable, Narcotic Cell, CID Crime, Ahmedabad, who

is also a member of the raiding party; P.W.4-Hasmukh Keshavlal Chauhan; P.W.5-Ranjitsinh Chensinh, PSO of Gomptipur Police Station; P.W.6-Ranjitsinh Pruthvisinh, who, according to prosecution, took the muddamal to the FSL; P.W.7-Dipsinh Virsinh, Crime Writer of Gomptipur Police Station and documentary evidence namely, FIR-Ex.24, panchnama, office copy of the information sent by the I.O. to the Superior Officer Exs.25, 26 and 27, rights given to the accused before search and seizure, Exs.28 and 30, office copy of the arrest memo; Ex.31 the reason of arrest; Ravangi Note Ex.34, receipt issued by FSL expert Ex.35, report Ex.36, information which was reduced in writing by Shri Tehelramani in the register Ex.37 and copy of the Station Diary Ex.13.

8. Mr.Mankad has mainly contended that all required procedures under the NDPS Act have been followed by the prosecution while carrying out search and seizure. Drawning our attention towards the information which was reduced in writing by P.I, Shri Tehelramani regarding the rights offered to accused prior to search and seizure, he has argued that even in this case, prosecution has informed the accused regarding their rights orally as well as in writing. He has also argued that the muddamal which was seized from the accused was sent to FSL and as per the report of FSL, it was contraband substance and, therefore, prosecution has proved the case against the accused beyond reasonable doubt.

9. Whereas learned counsel for the respondent-accused, Mr.M.J.Buddapatti has submitted that in this case, the quantity of alleged muddamal i.e. narcotic substance is very small weighing less than one gram. He has contended that from the very beginning till the end of investigation, prosecution has not followed any of the procedures required under the NDPS Act. He has argued that prosecution has failed to establish that alleged muddamal was kept with the prosecution and same was reached at the office of FSL in in-tact condition. He has also argued that the muddamal alleged to have been seized from the accused has not reached to FSL and, therefore, as per the opinion of FSL, muddamal which has been analysed by them is a contraband substance. But prosecution has failed to prove that it is the same muddamal which has been seized from the accused. So, in these circusmtances, the prosecution will not get any support from FSL report.

10. We have gone through the evidence of PI-Shri Tehelramani, Police Constable-Shri Vittaldas, Police Inspector-Shri Hasmukhbhai, PSO, Crime Writer of the

Gomptipur Police Station and Constable who has taken the mddamal to FSL. On going through the same, it is established that PI, Shri Tehelramani-P.W.8, when he was in his office at 15.00 hours on 1-5-1997, he received information through secret informant which was reduced in writing and he3 called the panchas through Head Constable, Vittaldas. Primary panchnama was prepared in the office itself between 15.30 and 15.45 hours and according to him, he and other police officers namely P.I., Shri Chauhan, Head Constable Kataria, Head Constable Vittaldas, etc. went to the place of information in the Government vehicle and when they waited for the accused to come, they found them there at about 16.25 hours and they were caught hold by Shri Chauhan and Kataria. They were informed about their rights to carry out the search and seizure in presence of an Executive Magistrate or before a Gazetted Officer. For that, we have evaluated the evidence of PI, Shri Tehelramani-P.W.8 along with the evidence of panch witnesses Shri Bhagvansinh-P.W.1, Arvindbhai Chhanabhai-P.W.3, Police Constable Vittaldas-P.W.4, P.I. Shri Hasmukh Keshavlal ChauhanP.W.4, Shri Rankitsinh Chensinh-P.W.5, Dipsinh Virsinh-P.W.7 and also documentary evidence. Though P.I., Shri Tehelramani has categorically deposed in his oral evidence before this Court that as soon as he received the information from his secret informant, the same was reduced in writing by him. He has also informed his Superior Officer to that effect. But prosecution has failed to establish the same though they have produced the information register Ex.37 and the letter written by Shri Tehelramani to the Police Superintendent, Narcotic Cell, Ahmedabad, Ex.25. It has been established from his cross-examination that Ex.25 is not an office copy, but original one and there is no inward or outward number upon Ex.25. P.I., Shri Tehelramani went to the extent and deposed that he personally went to the office of Superintendent of Police along with Ex.25 for showing the same to his Superior Officer and same was brought back by him. But said evidence of Shri Tehelramani is neither acceptable nor believable because had he informed his Superior Officer in writing, there must be outward number and had it been received by the Superior Officer, there must be inward number on it and original will remain with the office of Superintendent of Police and not with P.I. In short, Ex.25 is not an office copy, but original one and nothing has been there to establish that the same has been sent to Superior Officer or received by him as deposed by Shri Tehelramani. So, prosecution has not followed the procedure of not informing the Superior Officer. To that effect, there are other oral evidence which otherwise do

not support the say of witnesses namely P.I., Shri chauhan-P.W.4 and Head Constable Vittaldas. P.I., Shri Kataria has also deposed that as soon as they came to the conclusion that the persons who have been caught hold by P.I., Shri Chauhan and Shri Kataria are the same, he has informed them regarding their rights before search and seizure. Others have not supported the say of P.I., Shri Tehelramani on this point. P.W.2-Vittaldas, who, according to the prosecution, was a member of raiding party, has deposed in his oral evidence that before they started the raid, P.I., Shri Tehelramani has informed his Superior Officers and made an entry in the register. He has also deposed that Shri Tehelramani has asked the persons before search and seizure regarding their rights orally as well as in writing. In his cross-examination, he has admitted that the I.O. has recorded his statement but he has not stated the same at the time of recording his statement that Shri Tehelramani has reduced in writing. He has also admitted that Shri Tehelramani has informed the Superior Officer regarding the information which he has received. Same way, P.W.4-P.I. Shri Chauhan, who was also a member of the raiding party, has admitted in his cross-examination that in his statement recorded by the I.O., he has not stated that Shri Tehelramani has informed his Superior Officer regarding the information and same was reduced in writing in the register. So, say of Shri Tehelramani regarding the above referred point that he has informed the Superior Officer and has reduced in writing the information is not supported by any other member of the raiding party. Over and above, it is clear from the evidence that seal was applied by the prosecution at the time of seizure. According to prosecution, they have applied the seal of P.I., NDPS, CID Crime, Ahmedabad. But it does not tally with the document which has been received from FSL wherein the same has been found to be NDPS, CID Crime, G.S., NCIT.

11. The trial Court has come to the conclusion that the seal which is alleged to have been applied on the muddamal in question and the seal which is affixed on the muddamal received by the FSL are different. It has also come to the conclusion that as per the panchnama, weight of the muddamal was 1 gm. and 190 milligram and 1 gm and 180 milligram respectively whereas as per the FSL report, weight of the muddamal as per the expert report dated 6-6-1997 Ex.36 was 1 gm. and 0.8 milligram and, therefore, it has come to the conclusion that the muddamal analyzed by the FSL expert and the muddamal which was received by the FSL people are not the same which was seized by the prosecution. For which, we have

verified that there is the evidence on record and through oversight, the same has not been exhibited by the Court below. But as it has been proved from the oral evidence of P.W.8, Shri Tehelramani, it was required to be accepted and we treat the document as exhibited because it is a sheer mistake on the part of the court below for not being exhibited and as per the panchnama, the muddamal which has been recovered from the person arrested was 1 gm and 190 milligram and the muddamal which has been recovered from original accused No.2 was of 1.8 gm and as per the panchnama, seal was alleged to have been applied on the muddamal article Nos. A and B which reads as under:

"P.I., NDPS, G.S. CID Crime, Ahmedabad"

Even as per the oral evidence of P.W.2, Head Constable Vittaldas, the weight of the muddamal was 190 milligram. He has admitted in his cross-examination that Gujarat State, NDPS seal is having its own seal and their seal is P.I., NDPS, G.S. whereas P.I., Shri Chauhan P.W.4 has deposed in his oral evidence that the seal which was alleged to have been applied was of P.I., NDPS, GS, CID Crime, Ahmedabad whereas P.I., Shri Tehelramani has also deposed the same. Whereas the seal on Ex.34 and the authority letter dated 2-5-1997 and report Ex.36 are contrary to evidence on record. Same way, the weight and seal which have been described in the panchnama, FIR and as per the oral evidence of Head Constable, Vittaldas and the muddamal which was received by the FSL people do not tally each other.

12. In our opinion, prosecution is not able to establish that the muddamal alleged to have been seized was the same muddamal which was sent to FSL. So, the main link which is required to be established by the prosecution is missing in this case though the expert has opined that the muddamal which was investigated by them is a contraband narcotic substance. But the prosecution has failed to establish that the same has been recovered from the present respondent-accused No.1 and same was sent to FSL people though it has mainly relied upon the evidence of three people namely P.W.2-Head Constable Shri Vittaldas, P.W.4-P.I.,Shri Chauhan and P.W.5-Shri Ranjitsinh Chensinh. According to Head Constable Shri Vittaldas, after completion of formalities namely seizure panchnama, and lodging of FIR with Gomptipur Police Station, he has handed over the muddamal to PSI, Gomptipur Police Station and police has recorded his statement, but he does not know the name of Police Officer whom he has handed over the muddamal. Whereas

P.I., Shri Chauhan, has not deposed anything regarding the same as to what happened thereafter. Shri Ranjitsinh Chensinh, who was in-charge of PSO of Gomptipur Police Station on 1-5-1997 has deposed that he received the complaint through Head Constable Shri Vittaldas and he made an entry in the station diary to that effect as Entry No.18 at 2015 hours and thereafter, he has registered the offence as Prohi. C.R. No.5178 of 1997. Thereafter, he has handed over further investigation to PSI, Shri Parashia. He has deposed that he has handed over the muddamal in the office of Crime Writer who has sent the same to FSL. In his cross-examination, he has admitted that the muddamal remained with him for a period of one hour and he has not obtained any signature of Crime Writer for handing over the muddamal in question. He has admitted that in muddamal pauti, he has specifically mentioned "two seal bandh tin". Whereas P.W.6-Shri Ranjitsinh Prutvisinh has deposed in his oral evidence that Dipsinh Virsinh has handed over two seal tin to him for handing over to FSL on 15-1-1997 at about 1210 hours. But facts remain that P.I., Shri Tehelramani has received the information in question on 1-5-1997 at 1500 hours and all formalities have been completed at 1830 hours. So under any circumstances, muddamal has been received by PSO and later by Crime Writer Head not prior to 2000 hours. So, the deposition of Shri Ranjitsinh Prutvisinh on this point that he has received muddamal on 1-5-1997 at 1210 hours and he has handed over the same within half an hour is not believable. He has also deposed that he received two sealed tin and upon that, there is a seal of P.I., NDPS, SCH, CID Crime. He has admitted in his cross-examination that his name and buckle number were not mentioned in the receipt issued by FSL people. Prosecution has also examined P.W.7 Dipsinh Virsinh. According to him, he was in-charge of Crime Writer at Gomptipur Police Station. According to him, he received muddamal articles A and B from PSO, Ranjitsinh on 1-5-1997 and same has been sent to FSL through Ranjitsinh on 2-5-1997. In short, though the prosecution has tried to establish that the muddamal which has been seized from the accused have reached the FSL in tact condition and during that period, it has remained in such a condition. But as we have discussed earlier, the prosecution has failed to establish the same and, therefore, Court below has rightly come to the conclusion that the prosecution has failed to establish that the muddamal has been reached at the office of FSL on two days and it does not tally with the seal and weight. On close scrutiny of the evidence on record, we entirely agree with the finding recorded by the Court below on this point.

13. In short, prosecution has failed to establish the case against the present respondent and other accused and, therefore, Court below has rightly acquitted the respondent in the crime in question by giving a detailed reasoning in paras 8, 9 and 10. As we do not find any substance in this appeal, this appeal is required to be rejected.

14. Criminal Appeal is rejected. Respondent-Mohmedyusuf @ Munim is ordered to be released forthwith, if he is not required in any other case. Non-bailable warrant stands cancelled.

(K.R.Vyas,J.)

(R.P.Dholakia,J.)
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